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No. 97-404

IN THE

# Supreme Court of the United States

October Term, 1997

CYNTHIA J. FISHER,

*Petitioner,*

*v.*

VASSAR COLLEGE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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October 9, 1997

36 pp

## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether facts that do not inevitably, naturally or logically give rise to an inference of discrimination preclude or limit appellate review of a lower court's conclusion of discrimination?

## STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that respondent Vassar College has no corporate parents or non-wholly owned subsidiaries.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for a writ of *certiorari* seeking review of opinions of the Court of Appeals for the Second Circuit reported at 114 F.3d 1332 and 70 F.3d 1420.

## COUNTERSTATEMENT OF THE CASE

The petition attacks the court of appeals for "rulings" the court never made and asserts a split in the circuits on an issue not presented by the facts of this case.

The action concerns charges of unlawful discrimination under Title VII (42 U.S.C. § 2000e *et seq.*), the Age Discrimination in Employment Act ("ADEA", 29 U.S.C. § 623(a)(1)) and the Equal Pay Act (29 U.S.C. § 206(d)(1)), in connection with the denial of tenure to a Vassar biology professor.

As her first argument in support of the petition, petitioner asserts that the court of appeals improperly substituted its judgment for the district court's in accepting hypothetical reasons for the college's decision in lieu of a plausible finding of unlawful discrimination made by the district court (Pet. 5-7). In point of fact, the court of appeals reversed the judgment below because the discrimination finding could not be sustained by *any* evidence of record, or by any inferences tenably arising from such evidence, and because it was petitioner's burden, in making charges of discrimination, to substantiate them.

To show a split in the circuits—petitioner's second and principal argument for *certiorari*—petitioner points to a disagreement between decisions in the First and Fifth Circuits on the one hand, and those in the D.C., Third, Sixth and Eleventh Circuits on the other hand (Pet. 7-10).[1] The stated rationale of the passages that petitioner cites in the latter group of opinions (whether holding or dictum) is that (1) a natural and logical inference of unlawful discrimination can *always* be drawn from an employer's explanation that is proven to be mendacious, so that (2) a district court's sustainable finding of "pretext" based on such mendacity must *always* render unreviewable its ultimate finding of unlawful discrimination.

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[1] *Smith v. Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*); *but see Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir.), *vacated and reh'g en banc granted*, __ F.3d __, 1997 WL 569524 (D.C. Cir. Sept. 5, 1997); *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, 117 S.Ct. 2532 (1997); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3171 (July 28, 1997).

We believe the first proposition to be invalid, and the second to be an unsound departure from normal rules of appellate review as well as from the teaching of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). But neither proposition applies here, since no conduct even resembling "mendacity" was ever proven in this case.

Certainly one cannot assume "mendacity" from the mere fact of a sustained finding of pretext. As this Court stated in *St. Mary's*, the "factfinder's disbelief of the reasons put forward by the defendant" may not necessarily be "accompanied by a suspicion of mendacity" (509 U.S. at 511), and "surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar" (*id.* at 520).

Moreover, one cannot identify any facts in this record to support any finding of "mendacity". The only evidence specifically cited by the court of appeals in aid of the district court's ultimate finding of "pretext" was a tabulation of student appraisals prepared by petitioner's expert that the appellate court said "arguably" indicated that petitioner was a "good" teacher, despite substantially declining student evaluations during the period 1982-85 (232a, 234a-35a n.10).

There is, in sum, nothing about this case that raises a certworthy issue. Although some courts have erroneously opined, contrary to *St. Mary's*, that mendacious "pretext" plus the *McDonnell Douglas Corp. v. Green* four factors (411 U.S. 792, 802 (1973)) so invariably and necessarily give rise to an inference of discrimination as to render a district court decision to that effect unreviewable (*e.g.*, *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 885 (D.C. Cir.), *vacated and reh'g en banc granted*, __ F.3d __, 1997 WL 569524 (D.C. Cir. Sept. 5, 1997); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993)), none has reasoned to that result in the absence of mendacity, which are the facts here presented.

Indeed, to say that every time an employer declines to promote an employee, and the court disbelieves the stated reason, the real reason must have been unlawful discrimination, is not, of course, a defensible proposition. Nor does it improve materially, we submit, when the evidence additionally establishes that the employer chose between two qualified candidates who differed from each other in their ethnicity, religion, sex or race (which fact pattern—all that the *McDonnell Douglas* four factors require—would encompass most promotion decisions made every year in the United States).

Furthermore, this is scarcely a case in which the district court itself can be said to have inferred unlawful discrimination from a finding of "pretext" alone. The panel, in fact, read the district court opinion as acknowledging that no inference of discrimination could be drawn without the voluminous, so-called "discrimination-in-fact" findings, all of which the court of appeals overturned (31a, 57a).

There may well be, then, misreadings of *St. Mary's* to correct, and a split in the circuits to resolve; but if such functions are to be performed, the vehicle should be a case, unlike the present, that necessarily gives rise to the issue about which the circuits are actually debating.

**A. Vassar's 1985 Tenure Decision with Regard to Petitioner, and the District Court's Conclusion with Respect Thereto.**

At trial, petitioner claimed "sex-plus discrimination" under Title VII, based on her status as a married woman and the fact that she was not granted tenure as a biology professor at Vassar. Despite petitioner's explicit concession at trial that age was "not in the case", the district court, *sua sponte*, suggested that an age claim under ADEA be added (61a). The district court also allowed petitioner to amend her complaint, at the conclusion of her case, to add a charge of discrimination under

the Equal Pay Act (66a). The court then decided all such claims in petitioner's favor (165a, 171a, 174a).

Vassar had evaluated petitioner, however, as it did all candidates for tenure, on the basis of her scholarship, teaching ability, leadership and service to the college (9a). The initial report and recommendation was prepared by the tenured professors of the biology department, who were unanimous on the question (*id.*). Their report was then approved by reviews conducted at four different levels, all of which were also unanimous: the dean of the college, the Faculty Appointments and Salary Committee ("FASC"), the president of the college and the board of trustees (9a, 15a).

Petitioner is (and was in 1985) a married woman with children. Of the five tenured professors within the biology department who assessed her qualifications, four were women with children, including Dr. Patricia Johnson (229a-30a) who had been the chairperson of the department for nine years. Of the five members of the FASC (two women; three men), all were married and had children—as were the dean of the college and almost every member of the board.

The same year in which petitioner's tenure review was conducted, Vassar granted tenure to eight professors, six of whom were women, three married women (Dft. Exh. AB at E675-76, Tr. 2065, 2067)[2] (and another, Dr. Penina Norrod, who received tenure in the biology department, was in an established and long-standing relationship with a man she soon married, 50a). From 1977 to 1985, there were 72 tenure reviews at Vassar: 35 candidates were women, 27 of those women received tenure; and 18 of those then-tenured women were married (Dft. Exh. AB at E671-76, Tr. 2065, 2067).

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[2] "E__" citations are to the Joint Exhibits in the court of appeals; citations to "Tr. __" are to the transcript in the district court.

During the period 1972-84, of the 23 married women considered for tenure, 18 succeeded (51a).

To perceive "sex-plus" discrimination here and to find the biology department report a "pretext" for it required, among other things, a determination to disregard all such evidence. This, the district court did (a) by refusing to admit any evidence of college-wide tenure decisions (51a), (b) by defining the "protected class" as limited to women professors in "hard" sciences (47a), (c) by defining "hard" sciences to delete psychology (49a), and (d) by excluding (i) women with children but between marriages (49a-50a), (ii) women who were married but not, by petitioner's anecdotal evidence, "perceived" to be married (*id.*), (iii) previously married women with established and long-term relationships with men (*id.*), and (iv) married women who were co-members of the Vassar faculty with petitioner but were granted tenure between 1986-90 (53a-54a). Every fact that contradicted the narrowing of petitioner's class or the thrust of her "statistics" was ruled by the district court to be either insufficient for that purpose or inadmissible.

Petitioner having thus established the minimum *McDonnell Douglas* four factors (Dr. Norrod, the Vassar biology professor who received tenure in 1985, being deemed by the district court to have been in a different class from petitioner despite having been previously married and then in a long-standing relationship that led to marriage, 50a), Vassar came forward with its *McDonnell Douglas* "explanation", which, as noted, consisted of the grounds of the report and recommendation of the biology department (23a) that had been reviewed and accepted, under college-wide standards, up through the reviewing chain (13a, 15a).

In the opinion of the district court, all such grounds were "pretexts" (165a), most articulated in "bad faith" (*e.g.*, 79a-87a). (These findings, as we show below, were either explicitly overturned or, to the extent not expressly addressed

by the court of appeals, self-evidently unsustainable.) Moreover, although the lower court apparently deemed the finding of "pretext" itself to be an insufficient basis for a conclusion of discrimination (31a), the court found "discrimination-in-fact" evidence in various anecdotes from unhappy former members of the Vassar biology department (who had not been considered for tenure) (33a-36a) and in petitioner's "statistics" (44a-56a).

**B. The Initial Panel Opinion of the Court of Appeals.**

A unanimous panel of the court of appeals reversed as clearly erroneous, an abuse of discretion, or both, every district court finding of discrimination (57a, 66a, 70a) as well as virtually all the findings of "pretext" that the court of appeals considered (27a n.7, 28a). And the bases for those express reversals have considerable relevance to the nature of the findings that the court did not specifically address.

For example, as to alleged "discrimination-in-fact" evidence, petitioner had offered a letter (not testimony) from a former Vassar assistant professor to the effect that her "sense of being discriminated against" on the basis of having children was so high (despite the fact that almost everyone in the department and up the reviewing chain also had children) that, when she discovered she was pregnant, she "voluntarily and secretly had an abortion" (35a). Although this letter was allowed into evidence, not for the truth of its contents, but to show that notice had been given to the college of the writer's allegations, and although the alleged discriminated-against class was married women, not women with children, the district court, as the court of appeals stated, "cited this letter—and specifically noted the story of the compelled abortion—to support findings of discrimination" (35a-36a).

Petitioner's "statistical model" (which no expert in statistics validated, 44a n.10), was, as the court of appeals held,

> "built on gerrymandered data and a series of statistical fallacies. A spurious correlation between the marital status of women and their promotion in the 'hard sciences' at Vassar is created (a) by purposefully defining which sciences are hard and which are not; (b) by treating anecdotes as statistics; (c) by disregarding the pattern of school-wide tenure decisions; (d) by overlooking women who did achieve tenure in hard sciences; (e) by comparing married women to single women rather than by comparing women of each status with men similarly situated; and (f) by conflating marital status with status as a parent." (47a)

Indeed, as the court of appeals further noted, although Vassar itself, throughout the relevant period, had grouped psychology with other "hard" sciences within the same "Division III classification of Vassar's administrative structure" (47a), although Vassar had adduced direct evidence as to why psychology was as "hard" a science as others in that group,[3]

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[3] For example, the Dean of the College, in describing psychology as a "hard" science, gave the following testimony that was neither answered nor answerable:

> "Psychology at Vassar, as well as psychology throughout the nation[,] is an academic field, as opposed to . . . a clinical field, [and] as an academic field is based on the same experimental methodology that biology and chemistry, physics are based on.
>
> "It especially holds close paradigms and methods with biology. As there is great variety in the biological discipline, there's also a great variety in psychology. But our majors are required to take laboratory courses in experimental methodology, they are required to take

and although petitioner offered no evidence whatever to the contrary (49a), the district court, without explanation, accepted petitioner's exclusion of all data regarding the psychology department from petitioner's "statistics" (47a-48a).[4]

Additionally, the district court accepted *carte blanche* petitioner's misidentification of the status of married women as unmarried, and *vice versa* (49a-51a), and her exclusion from the sample of all tenure-track women hired while petitioner was at Vassar unless they had left prior to or during 1985 (52a-54a). As a result, as the court of appeals noted,

> "the most promising and successful of plaintiff's married female colleagues were excluded from the statistical model.

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> courses in statistics, they are required to explore the primary scientific evidence, they are required to do experimental and other sorts of studies as part of their undergraduate education.
>
> "It is very much an experimental science. Many of our subjects are people, but nevertheless, an experimental science." (48a, *quoting* Tr. 2217-18)

[4] Given the panel's exhaustive demolition of the findings accepting petitioner's "statistics" (44a-56a), it is difficult to understand how petitioner continues to rely on these "statistics" (Pet. 20 n.4), as though they had never been debunked.

Equally remarkable is petitioner's characterization as "unrebutted" (Pet. 20) "expert testimony" that the court of appeals found to be of "no probative bearing" (57a) because predicated on "statistics that are insubstantial, immaterial and riven by fallacies" (*id.*) and therefore "not based on credible evidence" (*id.*). To leave no doubt on the subject of whether this testimony was "unrebutted" or the contrary, the appellate court held that "the district court's adoption of [the expert's] conclusion was clearly erroneous" (*id.*).

> "There were six married female Vassar professors in the natural sciences who were in tenure-track positions at the time Fisher was denied tenure. Most did quite well." (52a-53a)

The fact that, in the very departments defined by petitioner as "hard" sciences, four tenure-track married women who were teaching at Vassar at the same time as petitioner were granted tenure after petitioner had left (54a) was explained away by the district court by surmising that Vassar must have changed its policy once petitioner had left (53a n.11).[5]

As to "pretext", of the "facts" the district court found supportive of the conclusion, the court of appeals expressly reviewed approximately half and rejected virtually all those findings on the ground that the record proved exactly the opposite, or that the findings were "unfounded", "unsubstantiated" or "conclusory" (27a-28a & n.7). It is far from obvious what the court of appeals considered to be sufficient evidence to uphold the district court's ultimate finding of "pretext" as not clearly erroneous; but it is clear that the court did *not* endorse *any* findings of "bad faith", that other "pretext" findings were deemed erroneous (27a n.7), and that

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[5] Although the 1985 cut-off was applied to exclude evidence favorable to Vassar regarding married-women professors receiving tenure after that date, the cut-off was ignored when it came to evidence favoring petitioner. For example, in comparing the quality of the publications of male tenure candidates with those of petitioner, the district court focused on a man tenured in 1987 (83a).

It might also be noted that, while the charge made in this case was gender-based discrimination, not discrimination solely on the basis of marriage, the lower court gave little attention to the fact that, in 1985, the other professor denied tenure in the Vassar biology department was a man, and the person granted tenure was a woman (15a).

the few findings of "mistakes" the court apparently thought Vassar had made (26a-27a) were plainly not considered mendacious (30a-31a), nor could they have been.

For example, the panel stated that the biology department had referred to petitioner's hiatus from the field as being ten years (40a), whereas the biology department report had noted nine years (Pl. Exh. 8 at E217, Tr. 249), and the district court had found the figure to have been "at most" eight years (128a). In fact, however, petitioner herself had represented to the National Science Foundation, on her grant application, that she had experienced a "ten year hiatus" (Pl. Exh. 62A at E425, Tr. 121); and petitioner variously testified in this case that her "hiatus" was eleven years (Tr. 735), "eight years" (Tr. 736) and "seven years" (Tr. 21). In all events, if there were any "mistake" here by Vassar, it was properly not regarded by the court of appeals as material or as grounds for a finding of "pretext", let alone evidence of mendacious behavior.[6]

Furthermore, while the panel decision as well as the separate *en banc* opinions of Judges Jacobs and Calabresi suggested that further review of the district court findings would yield further conclusions of clear error (27a n.7, 231a n.8, 254a n.13), there was no indication of what facts would

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[6] Also, the panel recited the contrast that the district court drew between petitioner's "9 months in the laboratory" during her sabbatical year and what the district court termed the biology department's description of "brief intermittent periods" (26a) (overlooking the fact that the department had itself noted the months involved). Although the panel might, therefore, have believed that the department had committed an error of omission, mistakenly agreeing with the district court in that respect (*see* p. 28 & n.17, *infra*), it did not agree that any such "error" gave rise to an inference of "bad faith", much less constituted "mendacity".

support the district court finding of "pretext" except for one passage in Judge Jacobs's concurrence:

> "Dr. Fisher testified about charts prepared for trial by her own counsel tabulating the numerical results of the student evaluation sheets for Dr. Fisher and the other specified candidates. These charts arguably support the idea that Dr. Fisher was a good teacher (hence the adequately supported finding of pretext)." (232a)[7]

In the light of that statement and the panel's conclusion of law that the ruling in *St. Mary's* applied (32a), the court had no need either to assess the remaining "pretext" findings for error or to identify whether there were any additional sustainable findings that might supplement that statement. The judgment below had to be reversed, in the court's view, for the absence of any evidence of discrimination.

**C. The *En Banc* Decision.**

Following rehearing *en banc*, seven of the eleven judges comprising the *en banc* court agreed with the panel's conclusion of law (that a sustained finding of "pretext" does

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[7] Although this conclusion was "arguable", the facts particularized in Judge Jacobs's concurrence demonstrate it to have been marginal at best, given the sharp decline in the students' ratings of petitioner's performance during the five years prior to her tenure review:

> "the percentage of students who ranked her in the top category for clarity declined from 39% to zero, and . . . the percentage who ranked her in the top category for ability to illuminate declined from 52% to zero. With respect to an advanced class . . . none of Dr. Fisher's students gave her a top rank and only 20% gave her a rank of four for ability to illuminate. (People who find this information insignificant have forgotten their college days)." (234a-35a n.10)

not preclude appellate review for clear error of an ultimate finding of discrimination) and, by limiting themselves to that issue, left standing the panel's overturning of findings and reversal of the judgment below (188a & n.1). In a separate opinion, concurring in the legal conclusion and dissenting in part, Judge Calabresi opined that, while he would personally rule that petitioner had failed to prove her claims, the case should be remanded to the district court for a determination as to whether the findings that were not overturned would still, in the district court's view, warrant the ultimate conclusion of discrimination (252a-53a).[8]

The dissenting opinion of then Chief Judge Newman, in which Judges Kearse, Winter and Cabranes concurred, took the position that sustainable findings of a *McDonnell Douglas prima facie* case plus "pretext", while not utterly precluding appellate review of an ultimate finding of discrimination, would (a) require the defendant, by "overwhelming" evidence,

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[8] Although Judge Calabresi indicated that there were additional district court findings, not specifically addressed by the court of appeals, which were also erroneous, and which, had his views been followed, would have had to have been expressly reviewed, nevertheless:

> "Because of the disposition of the case, it would only waste time to go over each of the alleged errors. I will point out one, that actually goes primarily to the existence of a pretext rather than directly to the ultimate question of discrimination." (254a n.13)

The "one" error that Judge Calabresi then discussed was an error that effectively overturned all the district court's findings concerning Vassar's judgment with respect to the rankings of the academic journals in which petitioner had published (and Judge Calabresi noted that a majority of the court had authorized him "to say that they agree with these observations", *id.*).

either to disprove discrimination or "establish" a "third reason" (*i.e.*, a reason for denying the job other than unlawful discrimination or the first proffered "explanation"), and (b) insulate the finding of discrimination from review if the defendant failed to do so (270a, 281a-85a, 291a). Although Judge Winter concurred in that result, he wrote a separate dissenting opinion (joined by the three other dissenters) in which he concluded that sustainable findings of the *McDonnell Douglas* four factors were themselves sufficient to support the result proposed by Judge Newman's opinion (325a).

## REASONS FOR DENYING THE WRIT

### I.

### THE SPLIT IN THE CIRCUITS CONCERNS AN ISSUE NOT PRESENTED BY THE FACTS OF THIS CASE.

1. In *St. Mary's*, this Court stated:

> "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the 'clearly erroneous' standard. . . ." (509 U.S. at 524)

We understand that passage to make clear that a sustainable finding of "pretext" does not preclude appellate review of an ultimate finding of unlawful discrimination—indeed, that it is precisely such an ultimate finding that is "subject, of course, to appellate review" and that such a review "should be conducted . . . under the 'clearly erroneous' standard".

Moreover, this Court, earlier in the *St. Mary's* opinion, had recognized that a finding of "pretext" could reflect either a "factfinder's disbelief of the reasons put forward by the

defendant" or such disbelief "accompanied by suspicion of mendacity" (*id.* at 511). It therefore necessarily follows that a sustainable finding of "pretext", even when coupled with such "a suspicion of mendacity", does not preclude appellate review of an ultimate finding of discrimination, even if an inference (if any) arising from the combination ("pretext" with mendacity) might be stronger than that (if any) based on "pretext" alone.

We further believe that the contrary rule urged by a number of circuits would be exactly the sort of "rigid", "mechanized" and "ritualistic" methodology decried by this Court in *St. Mary's* (509 U.S. at 519). No inference of fact X should be drawn from fact Y unless the existence of Y makes X more probable than not. *See Leary v. United States*, 395 U.S. 6, 36 (1969). In some cases, the grounds for the district court's disbelief of the employer's explanation might warrant an inference of discrimination; and in other cases (*e.g.*, the many examples discussed in the Second Circuit *en banc* opinion, 198a), it would not. To hold, then, that such disbelief must *always* preclude a "clearly erroneous" conclusion on review is to hold, contrary to reality, that such disbelief can *always* give rise to such an inference. Such a rule would, in effect, convert a sustainable finding of "pretext" into a *conclusive* presumption of unlawful discrimination at the option of a district court judge, no matter how manifestly absurd that ultimate conclusion.

We submit that there is nothing about this issue that would justify insulating district court rulings from the normal process of appellate review. On all other issues district court findings of fact are subject to appellate scrutiny under the "clearly erroneous" standard (Fed. R. Civ. P. 52(a)). Why not findings of discrimination? Acknowledging the difficulties to claimants of adducing direct evidence of discrimination does not warrant the grant of judgments against defendants on no evidence of discrimination at all.

2. Moreover, the approach urged by the dissenting opinions in the present case, as well as by petitioner and the *amici*, would be at least equally mechanistic and unsound.

In their view, the district court's disbelief of the employer's explanation should impose the need on the employer to "establish" by "overwhelming" evidence a "third reason" (270a, 281a-85a, 291a, *Am.* Br. 9) (*i.e.*, not unlawful discrimination; not the original "explanation"; but some other ground for not promoting or hiring the claimant). For this procedure to work, even mechanistically, one must imagine a trial somewhat like a tennis match: the claimant serves first and establishes the *McDonnell Douglas* four factors; the employer serves next and offers its "explanation"; the claimant then attempts to disprove the "explanation" and to offer such other evidence of discrimination that the claimant has; the employer, if it thinks the claimant's evidence effectively disproves the "explanation" (or perhaps on some signal from the judge or jury that it has), then gets an opportunity "overwhelmingly" to "establish" a "third reason".

But, of course, a trial is not conducted in that fashion. The rule advocated by the dissenting opinions, petitioner and *amici* would effectively require the employer, in its case in chief, to proffer its "explanation" with an "overwhelmingly" supported aside, "And if you don't believe that one, here is my 'third reason!'"

Nothing in *St. Mary's* or in the nature of the governing statute would warrant such a rule.

When (if at all) an inference of prohibited discrimination naturally and logically arises from the claimant's evidence, including evidence disproving the employer's "explanation", then the claimant should win if the employer lacks evidence overcoming that inference. On the other hand, when an inference of unlawful discrimination does *not* naturally and logically arise from the claimant's evidence, then the claimant

should not win; for in that instance, obviously, the claimant hasn't proven his or her charges. Distorting such results with mechanistic rules is to legislate against logic.[9]

3. While petitioner, *amici* and the dissenters in this case disagree with the opinions petitioners rely on in other circuits as to the mechanisms they propose, it is not surprising, since they all advocate mechanistic approaches, that they all proceed from the same premise. And it is that premise that distinguishes those decisions or *dictum* from the facts of the present case.

For example, in *Aka*, the D.C. Circuit panel quoted with approval the Seventh Circuit *dictum* in *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (1990), that

> "[i]f the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one . . . may rationally be drawn." 116 F.3d 876, 884 (D.C. Cir.), *vacated and reh'g en banc granted*, ___ F.3d ___, 1997 WL 569524 (D. C. Cir. Sept. 5, 1997).

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[9] *Amici* argue that, unless claimants are mechanically granted inferences of discrimination from sustainable findings of "pretext", which shift the burden onto the defendants, then claimants will be unable to prove disparate treatment cases without "smoking gun" evidence of discrimination (*Am.* Br. 7-8).

But why should that be so? What about, for example, strong circumstantial evidence of discrimination, properly prepared statistics, or contemporaneous documents that imply the use of gender-based or racially-based stereotypes? Again, the difficulties of proving any case where the issue concerns the defendant's state of mind (*e.g.*, *scienter*; intent to monopolize) do not justify mechanistic rules that confer recoveries where no valid claims exist.

We think that assertion is wrong, for the reasons noted above; but it is plainly the governing premise of the opinions in the Third, Sixth, Eleventh and D.C. Circuits. As it must be; for unless it were accepted that an employer's deliberate lie ("pretext" coupled with mendacity) could always give rise to an inference of forbidden discrimination, there could be no principled excuse for making such a finding unreviewable.[10]

Petitioner here necessarily rests on the same flawed premise; but this case, as noted above, presents no such facts. The district court's finding of "pretext" was barely sustained under a "clearly erroneous" standard (29a-30a). And not even the district court itself seemed to believe that the finding of "pretext" could alone support a conclusion of discrimination (162a, 164a-65a; *see* 31a). How the Third, Sixth, Eleventh and D.C. Circuits would react to a case such as this—one lacking mendacity as well as any creditable evidence of

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[10] To be sure, the decisions or *dictum* in these circuits also rely on another passage of the *St. Mary's* opinion—specifically:

> "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*. . . .'" (509 U.S. at 511 (emphasis and alteration in original, footnote omitted))

We believe that the words "will permit" must mean, in context, will *sometimes* permit; for, if "rejection of the defendant's proffered reasons" would *always* permit an inference of discrimination, thereby rendering a finding of discrimination unreviewable, then the subsequent passage of the opinion, that such a finding is "subject, of course, to appellate review—which should be conducted . . . under the 'clearly erroneous' standard" (*id.* at 524), would make no sense whatever.

discrimination—cannot be known with any certainty because those circuits, so far as we are aware, have not yet been presented with such a case.

4. Also as noted, the Second Circuit, after explicitly overturning virtually every district court finding on "pretext" it reviewed, as well as all others on discrimination, saw no need to continue that analysis. Under its (we submit, accurate) reading of *St. Mary's*, since "pretext" even coupled with mendacity does not render a finding of discrimination unreviewable, then surely a barely sustainable finding of "pretext" without mendacity is reviewable by the normal means under the normal standard.

As a consequence of the Second Circuit's approach, a number of the district court findings using the words "bad faith" or "dishonesty" were not expressly overturned by the court of appeals (*e.g.*, 93a). And, of course, petitioner must rely on those findings-in-limbo to bring her case within the linchpin premise of the opinions on her side of the "split". But such reliance confronts not only the appellate court's unconcealed discountenance of those findings but the record facts that so obviously refuted them.[11]

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[11] Although an employer's explanation for the failure to promote may be found to be "pretextual" even when not a deliberate lie—for "surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar" (*St Mary's*, 509 U.S. at 520)—the dictionary definition of the word "pretext" presupposes a deliberate lie (*see* 278a). It may have been for this reason or simply because of its irrelevance to the ground of the decision that Judge Calabresi's concurring opinion slipped from the fact of a sustained finding of "pretext" into the more extreme locution of "Vassar's lie" (251a-52a). In context, however, the reference appears to have been entirely hypothetical, for neither did Judge Calabresi cite any evidence

We take, as one example, the harshest district court finding, that of "purposeful dishonesty" regarding one of petitioner's National Science Foundation ("NSF") grants. According to this version, the chairman of Vassar's biology department, Dr. Mehaffey, had tricked petitioner by "deliberately ask[ing her] to remove" three letters allegedly containing "excellent NSF reviews of her work", which "clarif[ied]" earlier criticisms, while leaving in the file her own letter to NSF attaching and responding to that earlier NSF criticism of her original grant application (93a-94a).

The reality, as the record plainly demonstrates, is the extreme opposite of that rendition of the facts.

In the first place, nothing was put in, left in or taken out of this sector of petitioner's file, except as petitioner herself directed (Tr. 109, 111).[12] As was true of any tenure candidate at Vassar, petitioner had complete discretion as to the contents of this part of the department file (*id.*).

In the second place, while Dr. Mehaffey did no more than to suggest that petitioner remove the supposedly unqualifiedly "excellent" NSF letters, the suggestion, far from trickery, was the hallmark of fairness; and petitioner's best interests were obviously served by her following it. The well-based and already-formed perception of weakness in petitioner's scholarship was that it was based largely on the ideas of her

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to support such a conclusion nor does this record contain any.

[12] Vassar's departmental files regarding its professors are subdivided into a discretionary part, containing materials submitted for filing by the professor herself or himself, and a confidential part that contains salary and appraisal information (Tr. 1398-1400). It is the former part that this issue concerns.

collaborators.[13] These letters, read together, would plainly have confirmed that perception.[14]

In the third place, it was petitioner herself who decided to leave in one of those three NSF letters (written by a person who was himself one of petitioner's friends and collaborators, Pl. Exh. 62B at E436, Tr. 112) and remove the two that raised questions about her independence as a scholar (Tr. 581-83). And, in the fourth place, far from denying that she knew perfectly well that her own letter responding to enclosed earlier NSF criticism had been left in the file, petitioner's very complaint that it "had never occurred to me that there was any relevance" to that material affirmatively showed that she knew it was there (Tr. 594). As the unchallenged evidence made clear, neither she nor Dr. Mehaffey had focused on it during their discussion (Tr. 1398-1400), although she, having created this part of her file (Tr. 109), had considerably more familiarity with its contents than he did.

Moreover, the two letters that petitioner herself removed from the file in no way "clarified" or withdrew any of the

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[13] Even petitioner was then well aware of concerns within the department that her work had been principally confined to developing ideas originated by Dr. Sawyer and petitioner's sister, Dr. DeCoursey (*e.g.*, Pl. Exh. 62A at E425, Tr. 121: "I hope that my continued collaboration with Dr. Sawyer's group will not be interpreted as a lack of independence").

[14] *E.g.*, one of the supposedly unqualifiedly "excellent" NSF reviews of petitioner's grant application stated,

> "the methods for the dermal-epidermal separation are not compatible with receptor binding assays, and although she presents a possible method developed by a colleague (Dr. Sawyer), she acknowledges that the methods for *her* studies have not yet been worked out." (Pl. Exh. 62B at E435, Tr. 112, emphasis in original)

criticism of her earlier application; they simply evidenced the fact that petitioner and her collaborator had cured the problems with the original application that *NSF* had brought to their attention (Pl. Exh. 62B at E432-35, Tr. 112).

With regard to another NSF grant application, the district court castigated the Vassar biology department for supposedly having "belittled" petitioner's contribution in relation to that of her sister, Dr. DeCoursey (93a). Not only was there no such belittlement, however; the biology department gave petitioner more credit on this matter ("we appreciate that Ms. Fisher made and will continue to make a contribution to the development of [the project]", Pl. Exh. 8 at E220, Tr. 249) than did Dr. DeCoursey herself. For Dr. DeCoursey, ultimately, did not use petitioner's technique in her research, nor did Dr. DeCoursey's final paper list petitioner as an author (Tr. 1653-56).

All the district court's other findings with regard to both NSF applications are equally, conspicuously erroneous, as are each and every other finding of "bad faith" that the court of appeals felt it would "waste time" (254a n.13) expressly to review. While these are obviously factbound determinations, any notion that this record contains so much as a scintilla of evidence of "mendacity" would not survive even the scantest analysis of the pertinent facts. And absent such a tenable conclusion, this case stands, not as a vehicle for resolving the controversy that *amici* and petitioner wish addressed, but as an example of how a materially different, unchallenging issue may be resolved by standards that petitioner and *amici* themselves either espouse or accept.

## II.

## THE COURT OF APPEALS IN NO WAY DEPARTED FROM APPROPRIATE STANDARDS OF APPELLATE REVIEW IN OVERTURNING THE DISTRICT COURT'S FINDINGS AS CLEARLY ERRONEOUS.

Petitioner and *amici* agree on the assertion that (quoting *amici*), because "[t]here are *always* 'possible' explanations other than discrimination for why an employer has proffered a pretextual explanation" (*Am.* Br. 10) (emphasis in original), the court of appeals erred in "failing to identify the evidence in the record that rendered even one of those 'possible motivations' not just 'possible' but plausible as an alternative to petitioner's allegation of discrimination" (*id.*; Pet. 6-7).

This is the heart of petitioner's and *amici's* position; and it materially misstates the Second Circuit decision.

The burden of proof to establish unlawful discrimination was on petitioner. Petitioner did not meet that burden by advancing an "allegation". Nor did petitioner meet that burden by achieving a barely sustained finding of "pretext".

Unquestionably, the *en banc* court considered whether the rule was (or should be) that a sustainable finding of "pretext" should in *all cases* preclude review of an ultimate finding of discrimination. Whether such a rule could be justified for *all cases* depends on whether unlawful discrimination is more probable than not when the employer's "explanation" is "pretextual"—which, in turn, depends on whether in many cases there are other possibilities. It was in that context—and that context *only*—that the *en banc* court referred to the many such other "possibilities" (216a). And, given the undeniable existence of such "possibilities",[15] the court held that no

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[15] *Amici* themselves acknowledge the possibility that "cases where the inference of discrimination cannot follow from the finding of pretext are common rather than

mechanistic rule decreeing an inference of discrimination in *all "pretext" cases* made sense (218a) (following the conclusion also set forth in *St. Mary's*, 502 U.S. at 524).

The panel, which had earlier reached the same conclusion (30a-31a), then went on to hold that neither the grounds for sustaining the "pretext" finding nor any other evidence could rationally support the ultimate finding of discrimination (57a). And that ruling was made, not because of other "possibilities", but for the simple and basic reason that petitioner had failed to meet her burden of proof (57a, 60a, 66a, 70a).

There was absolutely no need, therefore, for the court of appeals to "identify evidence" of such "possibilities". Since it was petitioner, not Vassar, who had the burden of persuasion, it was the lack of creditable evidence to support her charges (*not* the existence of other "possibilities") that resulted, quite properly, in the dismissal of her case.

In short, whereas the court of appeals cited the many other "possibilities" merely as a reason why a simple finding of "pretext" does not invariably give rise to an inference of discrimination (or thus satisfy a claimant's burden of persuasion), petitioner and *amici* characterize those passages as the court's acceptance of other "possibilities" as sustaining the *defendant's* purported burden (that the court said was on the claimant) and as defeating a purported "inference" (that the court said did not arise).

There is error here, but it resides in petitioner's and *amici's* misdescription of the opinion they want, without good grounds, to have this Court review.

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exceptional" (at 9 n.1).

## III.

## THERE WAS NO SUSTAINED OR SUSTAINABLE FINDING OF SEX-STEREOTYPING IN THIS CASE FROM WHICH ANY ISSUE OF LAW ON THAT SUBJECT COULD ARISE, OR ANY HOLDING COULD BE REVIEWED.

Petitioner and *amici* contend that the court of appeals misperceived that sex-stereotyping may be evidence of discriminatory intent. But there was no such misperception (*see* 38a, 40a, 227a-28a); only the absence of a sustained or sustainable finding that any such stereotyping took place.

1. One source of petitioner's argument of sex-stereotyping comes from the district court's finding that "Dr. Mehaffey admitted at trial that the fact that the time plaintiff had taken off in order to raise a family was a principle [sic] factor in the Department's recommendation to deny her tenure" (168a). The district court cited that purported "admission" as "direct evidence that the Biology Department . . . was unable to overcome the stereotypical view of women as either scientist or wife—but not both" (*id.*).

The initial panel, however, overturned that finding, quoting the full text of the supposed "admission":

> Q: Did you join in the thought that her being ten years away from active involvement in biological research represented a huge gap in her knowledge that was presently relevant to her being on tenure track?
>
> A: Yes, I think I did. May I explain a little bit?
>
> Q: Certainly.
>
> A: Largely because the field moves very quickly. Any field in biology moves very quickly. And ten years of not being actively involved in the field means that you have an awful lot of catching up to do, and that's what we were

worried about here, just that there's an enormous amount of work to catch up. (41a, *quoting* Tr. 1906).

On the one hand, therefore, Dr. Mehaffey's testimony was clearly to the effect that the gap in petitioner's studies (a gap the department report itself identified as nine years, Pl. Exh. 8 at E217, Tr. 249) was "relevant" to the tenure decision in the sense of posing a question as to whether petitioner had caught up on developments in the field (a question the department basically answered in her favor, as other evidence showed, *e.g.*, Pl. Exh. 8 at E221, Tr. 249). The district court, on the other hand, concluded that Dr. Mehaffey had "*admitted*" that this gap was a "*principle* [sic] factor in the department's recommendation to deny her tenure" (168a, emphasis added). Being "relevant" as giving rise to a question is a far cry from being the "principal" reason for a decision.

In other words, that finding was flat-out disproved by all the evidence pertinent to it, which was why it was reversed; and no inference of sex-stereotyping or anything else can be drawn from such manifest error.[16]

2. The district court further referred to what it described as the "persistent fixation of the Biology Department's senior faculty on a married woman's pre-Vassar family choices" which, in the district court's view, also "reflect[ed] the acceptance of a stereotype and bias: that a married woman with an active and on-going family life cannot be a productive scientist" (128a).

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[16] Also, obviously, to compare the treatment accorded married and unmarried women (as the district court did in this as well as many other findings) is to determine whether discrimination has been engaged in on the basis of marriage, which is not actionable under Title VII, or any other statute relied on in this case. The point was made by the panel opinion (54a-55a) and by Judge Jacobs's concurrence (236a).

Not only, however, was there no such negative "fixation", but there was conclusive evidence to the contrary.

Initially it should be noted that it was petitioner herself who often called attention to what she referred to as her "ten year" (Pl. Exh. 62A at E425, Tr. 121) or even eleven year absence from the field (Tr. 735); for she was proud of the effort she had made after that hiatus to bring herself into familiarity with the developments that had occurred during that period. And in fact, she received full credit by the biology department report for having done so (*e.g.*, "we believe that this record represents significant scholarly acomplishment [sic]", Pl. Exh. 8 at E218, Tr. 249). The only reference made in the department report to her temporary absence from the field was in the initial summary of her *curriculum vitae* where it was stated that

> "She devoted, by her own report, nine years (1965-1974) entirely to her family and to her personal life." (Pl. Exh. 8 at E217, Tr. 249)

Hardly a "fixation" on Vassar's part, much less a "persistent" one; indeed, this was nothing more than a passing notation of a point that petitioner herself had brought up.

More importantly, however, the "sex-stereotyping" that the biology department was accused of entertaining as a consequence of the illusory "fixation"—"that a married woman . . . cannot be a productive scientist" (128a)—was belied on the face of the very department report that allegedly endorsed it. In the clearest possible terms, the biology department report repeatedly praised petitioner for being "productive" (Pl. Exh. 8 at E221, Tr. 249), for "a high level of energy and dedication" (*id.* at E218) and for putting "an immense amount of energy into establishing herself as a research scientist" (*id.* at E221). The department found fault with the *quality* of Fisher's work and with her decisions as to which work to pursue, but never with the amount of it.

3. Petitioner likes (and therefore emphasizes in her petition) the passing reference in Judge Calabresi's concurrence to Vassar having "incorrectly claimed" that petitioner "did not spend enough time in the lab" as *possibly* derived "from a discriminatory stereotype" (251a). While that characterization of the biology department report enabled the posing of the "interesting question" that Judge Calabresi went on to discuss (252a n.12), it cannot be substantiated on the face of the report itself.

The report, after noting the "intermittent brief periods during which [petitioner] was actually engaged in laboratory work", specified exactly what those periods were and gave her credit for every day of them (Pl. Exh. 8 at E221, Tr. 249).[17] But again, the self-evident point of this section of the report was not the *amount* of time she spent in the laboratory; it was the fact that, instead of concentrating in-depth on the area that was supposed to have been her major research subject, she had dispersed her energies into four different laboratory projects and a variety of other activities (Pl. Exh. 8 at E221, Tr. 249). This lack of a sustained in-depth probing of her "research problem" legitimately gave rise to questions "about her commitment" (*id.*)—exactly the sort of judgment that Judge Calabresi quite properly advocated (in the context of the rating of scholarly journals) should be left to the college as a matter of academic freedom (254a n.13).

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[17] Specifically: "[petitioner] was actually engaged in laboratory work: July and August, 1983 in Sawyer's laboratory, one week in February in Mary Tyler's laboratory and a little more than two months in summer, 1984 in Sengel's laboratory in Grenoble, and the months of January, April, and May 1984 at Vassar." (Pl. Exh. 8 at E221, Tr. 249)

As opposed to that particularized 7 1/2-to-eight-month period, petitioner conclusorily asserted nine months, which the district court chose to believe (98a).

The "question" that Judge Calabresi found "interesting"—and which petitioner and *amici* urge this Court to consider—is whether any given sex-stereotype, plausible in the abstract although never shown to have been entertained by the defendant (here, the argument goes, that "*married* women with children spend less time in labs than *unmarried* women with children") should lend "more weight" to the sort of "error" Vassar allegedly made (in supposedly claiming that petitioner "did not spend enough time in the lab", 251a) because the stereotype and error are "linked" (252a n.12, emphasis in original).

This case, however, presents no such question. Not only did petitioner fail to show that Vassar was in the grip of this alleged stereotype; the evidence categorically demonstrated the opposite. And not only did petitioner fail to prove that Vassar had made any material misstatement regarding her time in the lab; the biology department's particularization of that time differed inappreciably from petitioner's own disparate conclusory assertions on the subject. Moreover, the "stereotyping" that the "interesting question" concerns is marriage-stereotyping, not sex-stereotyping; so that the "question" itself not only fails to pertain to the facts of this case, it is not even "linked" to any statute yet enacted.

In sum, there is no question but that sex-stereotyping, where it occurs, is relevant to discrimination; but there should be equally no question that it should not be assumed to occur when there is no evidence of its occurrence. In this field of law, it is understandably tempting to exponents of either side of the philosophical debate to restate the facts of a given case so that they fit the mold of an "interesting question". But where the actual facts do not properly support such characterizations, rendering rulings on the consequently hypothetical record would both injure parties to the litigation and do disservice to the development of the law.

## CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

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Respectfully submitted,

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